THE GROWTH OF TRIAL BY JURY IN ENGLAND.

THE national origin of trial by jury, its historical development, and the moral ideas on which it is founded, have all been discussed by a variety of writers with the acute penetration of philosophical research. The foundation of the institution of trial by jury was not laid in any act of the legislature, but it arose silently and gradually out of the usages of a state of society which has forever passed away. It used to be the generally received opinion at one time that the founder of this institution was Alfred the Great; but this idea has been dispelled of recent years by an enlightened spirit of historical criticism which has been applied to the subject.

Various and conflicting have been the opinions expressed by writers as to the origin of this institution, some writers even considering it a hopeless task to attempt to inquire into its origin. Thus Bourguignon says, *Son origine se perd dans la nuit des temps.* Blackstone, one of our great legal authorities, speaks of it "as a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof," and he adds, "certain it is that juries were in use amongst the earliest Saxon colonies." Du Cange and Hickes were of opinion that it was introduced by the Normans, who themselves borrowed the idea from the Goths. Meyer, in his work on *The Origin and Progress of the Judicial Institutions of Europe*, looks upon the jury as partly a modification of the Grand Assize established by Henry II., and partly an imitation of the feudal courts erected in Palestine by the Crusaders; and he fixes upon the reign of Henry III. as the era of its introduction into England. Reeves, in his *History of English Law*, gives it as his opinion, that, when Rollo led his followers into Normandy, they carried with them this mode of trial from the North. He says that it was used in Normandy in all cases of small importance, and that when the Normans had transplanted themselves into England they endeavored to substitute it in the place of the Saxon tribunals. He therefore speaks of it as a novelty introduced by them soon after the Conquest, and says that the system did not exist in Anglo-Saxon times. Sir Francis Palgrave says

that a tribunal of sworn witnesses, elected out of the popular courts, and employed for the decision of rights of property, may be traced to the Anglo-Saxon times, but that in criminal cases the jury appears to have been unknown until it was established by William I. Mr. Serjeant Stephen says, "We owe the germ of this (as of so many of our institutions) to the Normans, and it was derived by them from the Scandinavian tribunals, where the judicial number of twelve was always held in great reverence." Many eminent writers have strongly maintained that the English jury is of indigenous growth, and was not derived, either directly or indirectly, from any of the tribunals that existed on the Continent. Some others have held that it is of ancient British or Romano-British origin. Others, again, have considered that the Anglo-Saxon compurgators (or sworn witnesses to credibility), the sworn witnesses to facts, the frith-borh, the twelve senior thegns of Ethelred's law, who were sworn to accuse none falsely, the system of trial in local courts by the whole body of the Shire or Hundred, contain the germ of the modern jury. Yet, with the exception of what may be termed Ethelred's Jury of Presentment, not one of these supposed origins would be found, if we examined them closely, to possess much more than a superficial analogy to the inquest by sworn recognitors, the historic progenitor of the existing jury.

The theory which presents the fewest difficulties, and which is supported by very weighty arguments, regards the English system of sworn inquests as being derived from Normandy. There, both prior to and subsequent to the cession of the Neustrian province to Rollo by Charles the Simple, it had existed, as in the rest of France, from its establishment under the Carlovingian kings, whose Capitularies contain minute instructions for inquisitions by sworn witnesses in the local courts. But, whatever may be the remote source of this institution, out of which trial by jury grew, two points are at any rate clear. (1) The system of inquest by sworn recognitors, even in its simplest form, makes its first appearance in England soon after the Norman Conquest. (2) This system was in England, from the first, worked in close combination with the previously existing procedure of the shire-moot; and, in its developed form of "trial by jury," is distinctly an English institution. When we attempt to inquire into the origin of an institution which has come down to us from hoary antiquity we must carefully note under what form it appears when for the first time it receives the notice of contemporary writers. This often differs considerably from the form

and character which it assumes in the growth of years. There is one important feature in this institution, and it is this, that its members give their decision under the solemn sanction of an oath; but this feature is not peculiar to this institution, for under the like sanction the *Dicasts* at Athens and the *Judices* at Rome decided. The same rule also prevailed in the old Norse *Thing* and German *Mallum*, where the right of all the inhabitants of the Gau or Mark to be present in the judicial proceedings of these periodical assemblies became in practice limited to a few, as the representatives of the community. But the distinguishing characteristic of the system is that the jury consists of a body of men taken from the community at large, and summoned for the purpose of finding the truth of disputed facts, who are quite distinct from the judges or the court. Their duty is to decide upon the effect of evidence, so that the court may be able to pronounce a right judgment. Twelve men of ordinary ability are just as capable of deciding to-day on the effect of evidence as they were in the infancy of the institution. Although the technicality of the law has increased, yet it in no way interferes with their fitness to decide on the effect of proofs. And this is the reason why the English jury flourishes still in its pristine vigor, whilst the old juries of the Continent have either fallen into decay or been entirely swept away.

No trace of such an institution as a jury can be found in Anglo-Saxon times, for if it had existed distinct mention would have been frequently made of it in the body of Anglo-Saxon laws and contemporary chronicles which we possess, extending from the time of Ethelbert (A. D. 568–616) to the Norman Conquest, but no mention is made.

With respect to criminal trials, we meet, in the ordinance of King Ethelred II. (978–1016), with a kind of jury of accusation, resembling our Grand Jury, and possibly its direct progenitor. In the Gemot of every Hundred, the twelve senior thegns, with the reeve, were directed to go apart, and bring accusation against all whom they believed to have committed any crime. But this jury did not decide the guilt or innocence of the accused; that had to be decided by compurgation or the ordeal. This primitive Grand Jury probably continued in use after the Norman Conquest, until it was reconstituted by Henry II. For more than a hundred years after the Norman Conquest, the ancient Anglo-Saxon modes of trial, or forms of proof, by ordeal (*judicium Dei*), by oath (compurgation, termed later "wager of law"), by witnesses and production of

charters, continued in general use, alongside the Norman procedure, — the wager of battle, and the occasional use of the inquest by sworn recognitors. The Conqueror was doubtless desirous that the English should still continue to enjoy the rights and usages to which they had been accustomed. Consequently we find that the distinctive features of the Anglo-Saxon jurisprudence were retained by the Conqueror. But he made, however, some important changes in the judicial system; he separated the spiritual and temporal courts; he introduced the combat, or duel, as a means of determining civil suits and questions of guilt or innocence; and he appointed justices to administer justice throughout the realm.

It was only by degrees, however, that the advantages of the principle of recognition by jury in its application to judicial matters were realized. The sworn inquest appears to have been at first chiefly used for the determining of non-judicial matters, such as the ascertaining of the law of King Edward, the assessing of feudal taxation under William II. and Henry I., and the customs of the Church of York, which the last named monarch, in 1106, directed five commissioners to verify by the oath of twelve citizens. On one occasion the Conqueror ordered the Justiciars to summon the shire moots, which had taken part in a suit touching the rights of Ely; a number of the English who knew the state of the lands in question in the reign of Edward the Confessor were then to be chosen; these were to swear to the truth of their depositions, and action was to be taken accordingly. But still there are equally early instances of strictly legal matters being decided by the recognition on oath of a certain number of *probi et legales homines*, selected from the men of the county to represent the neighborhood, and testify to facts of which they had special knowledge. Recognition by jury was applied by Henry II. to every description of business, both fiscal and legal.

The primitive German courts were tribunals of fully qualified members of the community, capable of declaring the law or custom of the country, and of deciding what, according to that custom, should be done in the particular case brought before them. They were not set to decide what was the truth of facts, but to determine what action ought to be taken upon proof given. The proof itself was furnished by the oaths of the parties to the suit and their compurgators, the production of witnesses, and the use of the ordeal: trial by battle being a sort of ultimate expedient for obtaining a practical decision, an expedient partly akin to the ordeal as a judg-

ment of God, and partly founded on the idea that, when legal measures had failed, recourse must be had to force. The complainant addressed his charge to the defendant in solemn traditional form; the defendant replied to the complainant by an equally solemn verbal and logical contradiction.

The compurgators, joining their hands, with one voice swore to the purity of the oath of their principal. If the oath was inconclusive the parties brought their witnesses to declare such knowledge as their position as neighbors had given them; the court, having determined the point to which the witnesses must swear, they swore to that particular fact. If the witnesses also failed, the ordeal was made use of. And where the defeated party called in question the sentence thus obtained, he might challenge the decision of the court by appealing to the members of it for a trial by combat. This practice, however common among some branches of the German stock, was by no means universal, and was not practised among the native English.

In these proceedings we find circumstances which, when viewed superficially, appear to be analogous to the later trial by jury; but on closer examination we see that they warrant no such impression. The ancient judges who declared the law and gave the sentence — the *rachinburgii* or the *scabini* — were by no means the equivalent of the modern jury, who ascertain the fact by hearing and balancing evidence, leaving the law and sentence to the presiding magistrate. Nor were the ancient witnesses, who deposed to the precise point in dispute, more nearly akin to the jurors, who have to inquire the truth and declare the result of the inquiry, than to the modern witnesses, who swear to speak not only the truth and nothing but the truth, but the whole truth. The compurgators swore to confirm the oath of their principal, and the only thing they had in common with the modern jury was that they took an oath. Although this is so, yet the procedure in question is a step in the history of the jury: the first form in which the jury appears is that of witnesses, and the principle which gives weight to that evidence is the belief that it is the testimony of the community; even the idea of the compurgatory oath is not without the same element; the compurgators have certain legal qualifications which shall secure their credibility. Beyond this point, modified here as elsewhere by local usages, the Anglo-Saxon system did not proceed. The compurgation, the sworn witness, and the ordeal supplied the proof; and the sheriff with his fellows, the bishop, the shire-thegns, the *judices* and *juratores*, and the suitors of the court declared the law.

The Normans generally abolished trial by compurgators in criminal cases, and though the trial by ordeal long continued in force, it began to be looked upon as an impious absurdity. In the year 1215, the year of the granting of Magna Charta, the ordeal was abolished throughout Western Europe by the Fourth Lateran Council, which prohibited the further use of that mode of trial; so that trial by jury became unavoidably general in England in order to dispose of the numerous class of cases when the charge was preferred, not by an injured individual against the culprit in the form of an appeal, but by the great inquest of the country (our modern Grand Jury) in the form of a presentment. For it was only where there was an accusing appellant that the trial by battle was possible. But still there was for a long time no mode of compelling a prisoner to submit the question of his guilt or innocence to twelve sworn men, summoned from the neighborhood.

The thirty-ninth section of Magna Charta says: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land" (*nisi per legale judicium parium suorum, vel per legem terræ*). This has been generally taken as establishing the institution of trial by jury. But such cannot be the case, for the same expression occurs in a compilation of our laws of earlier date than Magna Charta. It is to be found in the *Leges Henrici Primi.* Thus: *unusquisque per pares suos judicandus est et ejusdem provinciæ.* Mr. Forsyth, in his learned treatise entitled *History of Trial by Jury*, gives it as his opinion that the *pares* here spoken of have no reference to a jury. He considers that "they may possibly include the members of the county and other courts, who discharged the functions of judges, and who were the peers or fellows of the parties before them." And he goes on to say that, "in a stricter and more technical sense, however, they may mean the homage or suitors of the baronial courts, which had seignorial jurisdiction, corresponding to the hall-motes of the Anglo-Saxons, and in some degree to the manorial courts of the present day. And the words above quoted from the laws of Henry I. were taken by the compiler from the Capitularies of Louis IX. of France, where we know that no such institution as the jury existed until the period of the first Revolution." The "*judicium parium*" of Magna Charta is the enunciation, however, of a general legal principle rather than the technical definition of a mode of trial. "It lay," says Stubbs, "at

the foundation of all German law, and the very formula here used it probably adopted from the laws of the Franconian and Saxon Cæsars."

The use of a jury, both for criminal presentment and civil inquest, is mentioned for the first time in our statute law in the Constitutions of Clarendon. The manner in which the jury is referred to gives one the impression that it was already in common use. The statute declared that "by the recognition of twelve lawful men," the Chief Justice should decide all disputes as to the lay or clerical tenure of land.

By the Assize of Clarendon, it was ordained that in every county twelve lawful men of each hundred, with four lawful men from each township, should be sworn to present all reputed criminals of their district in each county court. The persons so presented were to be at once seized, and sent to the water ordeal. This was simply a revival, in an expanded form, of the old English institution analogous to a Grand Jury, which, as we have seen, had existed at least since the time of Ethelred II.

It was in the Grand Assize (the exact date of which is unknown) that the principle of recognition by jury, having gradually grown into familiar use in various civil matters, was applied by Henry II. in an expanded form, to the decision of suits to try the right to land. This Assize is called by Glanvill, a contemporary and the earliest of our judicial writers, a *regalis institutio*. In it we first find the jury in its distinct form, but the elements of which it was composed were all familiar to the jurisprudence of the time. By the Grand Assize the defendant was allowed his choice between wager of battle and the recognition of a jury of twelve sworn knights of the vicinage summoned for that purpose by the sheriff.

The *Assisa* or *Magna Assisa*, as it was usually termed, was a mode of trial confined to questions concerning (1) the recovery of lands of which the complainant had been disseised; (2) rights of advowsons; (3) claims of vassalage affecting the civil status of the defendant. A writ was then addressed to the sheriff, commanding him to summon four knights of the neighborhood where the disputed property lay, who were, after they were sworn, to choose twelve lawful knights who were most cognizant of the facts (*qui melius veritatem sciant*), and who were upon their oaths to decide which of the parties was entitled to the land. The defendant was also summoned to hear the election of the twelve jurors made by the four knights, and he might object to any one of them. When

the twelve were duly chosen they were summoned by writ to appear in court, and testify on oath the rights of the parties. They took an oath that they would not give false evidence, nor knowingly conceal the truth; and by knowlege, says Glanvill, was meant what they had seen or heard by trustworthy information, and this shows most clearly how entirely they were looked upon as mere witnesses, and how different the idea of their duties then was from what it is now. If they were all ignorant as to the rightful claimant, they testified this in court, and then others were chosen who were acquainted with the facts in dispute. But if some did, and some did not know the facts, the latter only were removed, and others were summoned in their place, until twelve at least were found who knew and agreed upon the facts. If the jurors could not all agree, others were added to the number, until twelve at least agreed in favor of one side or the other. This process was called "afforcing" the assise. The verdict of the jury was conclusive; and there could be no subsequent action brought upon the same claim, for it was a legal maxim that *lites per magnam assisam domini Regis legitime decisæ nulla occasione rite resuscitantur imposterum.* If the jurors were guilty of perjury, and were convicted or confessed their crime, they were deprived of all their personal property, and were imprisoned for a year at the least. They were declared to be infamous, and became incompetent to act as witnesses or compurgators in future (*legem terræ amittunt*), but were allowed to retain their freeholds. From this we see that this proceeding by assise was nothing more than the sworn testimony of a certain number of persons summoned that they might testify concerning matters of which they were cognizant. So entirely did the verdict of the recognitors proceed upon their own prejudgment of the disputed facts that they seem to have considered themselves at liberty to disregard the evidence which was offered in court, however clearly it might disprove the case they had come there to support.

Although twelve was the most usual number of the jurors of assise for some years, it was not the unvarying one. When the institution was in its infancy, the number appears to have fluctuated according to convenience or local custom.

In trial by jury, as permanently established both in civil and criminal cases by Henry II., the function of the jury continued for a long time to be very different from that of the jury of the present day. The jurymen were still mere recognitors, giving their verdict solely on their own knowledge of the facts, or from tradition,

and not upon evidence produced before them; and this was the reason why they were always chosen from the hundred or vicinage in which the question arose. On the other hand, jurymen in the present day are triers of the issue; they base their decision upon the evidence, whether oral or written, brought before them. But the ancient jurymen were not impanelled to examine into the credibility of evidence; the question was not discussed before them; they, the jurymen, were the witnesses themselves, and the verdict was, in reality, the examination of these witnesses, who of their own knowledge gave their evidence concerning the facts in dispute to the best of their belief. Trial by jury was, therefore, in the infancy of the institution, only a trial by witnesses; and jurymen were distinguished from other witnesses only by customs which imposed upon them the obligations of an oath, and regulated their number, and which prescribed their rank and defined the territorial qualifications whence they obtained their degree and influence in society.

Thus we see that the jurors founded their verdict on their personal knowledge of the facts in dispute, without hearing the evidence of witnesses in court. But there was an exception in the case of deeds in which persons were named as witnessing the grant or other matter testified by the deed. And thus an important change was made, whereby the jury, ceasing to be witnesses themselves, gave their verdict upon the evidence brought before them at the trials.

In the time of Glanvill, the usual mode of proving deeds the execution of which was denied was by combat, in which one of the attesting witnesses was the champion of the plaintiff. If the name of no attesting witness was inserted in the deed, the combat had to be maintained by some other person, who had seen or known of the execution. Another mode of proof was by comparing the disputed deed with others admitted or proved to have been executed by the party; but this, which would at the present day be a question for the jury, was determined then by the court.

In reality, however, since jurymen were originally mere witnesses, there was no distinction of principle between them and the attesting witnesses, but gradually in the course of time a separation took place; for although we find in the Year Books of the reign of Edward III. the expression, "the witnesses were joined to the assize," a clear distinction is, notwithstanding, drawn between them. Thus, in a passage where these words occur, we are told that a witness was challenged because he was of kin to the plaintiff; but the objection was overruled, on the ground that "the verdict could not be received

from witnesses, but from the jurors of assise." And it was said that, when the witnesses did not agree with the verdict in an inquest, the defeated party might have an attaint.

The difficulty that was found of procuring a verdict of twelve caused for a time the verdict of the majority to be received. In the time of Edward IV., however, the necessity for a unanimous verdict of twelve was re-established.

In the Year Books of 23 Edward III. mention is made of witnesses being adjoined to the jury to give their testimony, but without any voice in the verdict. This is the first indication of the jury deciding on evidence formally produced in addition to their own knowledge, and forms the connecting link between the ancient and modern jury. As the use of juries became more frequent, and the advantage of employing them in the decision of disputes more manifest, the witnesses who formed the *secta* of a plaintiff began to give their evidence before them, and, like the attesting witnesses to deeds, furnished them with that information which in theory they were supposed to possess previously respecting the matter in dispute. The rules of evidence now became more strict. We find that early in the reign of Henry IV. a still further advance was made. All evidence was required to be given at the bar of the court, so that the judges might be able to exclude improper testimony. From this change two important consequences followed: (1) from the exercise of control on the part of the judges sprang up the whole system of rules as to evidence; (2) the practice of receiving evidence openly at the bar of the court produced a great extension of the duty of an advocate. Henceforward witnesses were examined and cross-examined in open court. Except as regards the right of the jury to found their verdict upon their own private knowledge, the trial was conducted on much the same principles as at the present day. Juries were, however, for a long time entitled to rely on their own knowledge in addition to the evidence. In the first year of Queen Anne the Court of Queen's Bench decided that, if a jury gave a verdict of their own knowledge, they ought so to inform the court, that they might be sworn as witnesses. This and a subsequent case in the reign of George I. at length put an end to all remains of the ancient functions of juries as recognitors. While the jurymen were mere recognitors, if they gave a wrong verdict they must usually have been guilty of perjury. Hence, at common law, they became liable to the writ of attaint. In attaint the cause was tried again by a jury of twenty-four. If the verdict of the sec-

ond jury was opposed to that of the first, the original twelve jurors were arrested and imprisoned; their personal chattels were forfeited to the King, and they became for the future infamous. After the jury became distinct from witnesses, attaint gradually fell into disuse. Besides the legal method of attaint, there was also another and illegal method of punishing a jury for a false verdict, frequently employed by the Tudor and Stuart sovereigns for political purposes. This was by fine and imprisonment by the Court of the Star Chamber. After the abolition of the Star Chamber, the Crown made use of the judges to intimidate juries. At length the immunity of juries was finally established in 1670 by the celebrated decision of Chief Justice Vaughan in *Bushell's Case.*

The institution of trial by jury has thus been traced from the period of its first introduction into England, when the jury acted as mere recognitors, up to the time when they finally became separated from the witnesses, and gave their verdict, not from their own previous knowledge of the disputed facts, but from a consideration of the evidence which was brought before them. An institution like the jury, existing for ages amongst a people, cannot but influence the national character. The very essence of trial by jury is its principle of fairness. The right of being tried by his equals, that is, his fellow citizens, taken indiscriminately from the mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, gives every man a conviction that he will be dealt with impartially, and inspires him with the wish to mete out to others the same measure of equity that is dealt to himself.

With regard to trial by jury in civil cases, we cannot speak in such high commendation, for it has many and grave disadvantages which prove that it is wholly unsuitable for the settling of disputes in courts of law at the present day. Great changes are required in that institution in order to adapt it to a time which boasts of having reached the highest civilization in the history of the world, and to the necessities of a people whose government, laws, literature, commerce, and social life have scarcely any resemblance to those of their rude ancestors six hundred years ago.

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